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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 11

CANADA PACKERS, LIMITED,

Petitioner,

VS.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENTS' BRIEF.

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October 1966.

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TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Question Presented	2
Statement	2
Summary of Argument	7
Argument	10
I. The Interstate Commerce Commission, in Awarding Damages on Account of Unreasonable Freight Charges for Railroad Transportation of Potash From New Mexico, Cannot Penalize Carriers to a Greater Extent on International Shipments Moving Into Canada Than on Contemporaneous Shipments Traversing Only the United States Portion of Such Routes Where A Maximum Reasonable Rate Had Been Prescribed for That Portion	10
II. The Commission, in Awarding Damages on Account of Unreasonable Freight Charges, Cannot Award Different Measures of Damages Where the Only Difference Between Shipments Is the Amount of Transportation Performed Within a Foreign Country	15
III. The Decision of the Court of Appeals Protects Carriers From Arbitrary Changes in the Commission's Standards of Reasonableness for the Same Measure of Transportation	17
IV. The Commission's Arguments Are Not Germane to the Issue of the Jurisdiction of the Commission to Require Reparation Based Upon an Entire International Joint Rate Where the Commission Also Had Made a Finding of Maximum Reasonableness Between the United States Points Involved	19

V. It Is Not Necessary for the Court to Reexamine Its Decisions in Order to Resolve the Issue Presented, But Even if the Court Should Reexamine and Modify Such Decisions, the Result Here Would Not Differ in Substance From the Decision Below 22

Conclusion 27

Proof of Service 28

List of Authorities Cited.

Table of Cases.

Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co., 284 U. S. 370 (1932) 18

Black Horse Tobacco Co. v. Illinois Central Railroad Co., 17 I. C. C. 588 (1910) 14

Canada Packers, Ltd. v. Atchison, Topeka & Santa Fe Railway Co., 313 I. C. C. 759 (1961) 4

Carlowitz v. Canadian Pacific Railway Co., 46 I. C. C. 290 (1917) 21

Citizens Gas & Coke Utility v. Canadian National Railways, 325 I. C. C. 527 (1965) 14

Conrad Fafard, Inc. v. Canadian National Railways, 302 I. C. C. 163 (1957) 21

Consolidated Rendering Co. v. Atchison, Topeka & Santa Fe Railway Co., 287 I. C. C. 673, 300 I. C. C. 87 (1957) 3, 12, 15, 24

Great Northern Railway Co. v. Sullivan, 294 U. S. 458 (1935) 26

H. K. Porter Co. v. Central Vermont Railway, 366 U. S. 272 (1961) 20

International Nickel Co. v. Director General, 66 I. C. C. 627 (1922) 14

International Paper Co. v. Delaware & Hudson Co., 33 I. C. C. 270 (1915) 21

Lewis-Simas-Jones Co. v. Southern Pacific Co., 283 U. S. 654 (1931) 8, 10, 11, 12, 26

Louisville & Nashville Railroad Co. v. Sloss-Sheffield Steel & Iron Co., 269 U. S. 217 (1925) 13

News Syndicate Co. v. New York Central Railroad Co., 275 U. S. 179 (1927) 8, 10, 11, 12, 14, 26

Pittston Paper Corp. v. Canadian National Railway Co., 165 I. C. C. 141 (1930) 21

Sulphur, Canadian Origins to East St. Louis, Ill., 326 I. C. C. 288 (1966) 21

United States v. Pennsylvania Railroad Co., 323 U. S. 612 (1945) 10, 18, 25, 26

Statutes.

Interstate Commerce Act (49 U. S. C. § 1 et seq.)

Section 1(1) 2, 7, 9, 10, 12, 17, 18, 25, 26, 27

Section 1(2) 2, 7, 9, 10, 12, 17, 18, 25, 26, 27

Section 1(5) 2, 7, 10

Section 8 2

Section 16 2

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RESPONDENTS' BRIEF.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 36-40) is reported at 342 F. (2d) 563. The findings of fact and conclusions of law of the District Court (R. 33-34) are not reported. The report of the Interstate Commerce Commission (R. 9-17) is reported at 313 I. C. C. 759; its reparation order entered August 28, 1962 (R. 19-21) is not reported.

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1. The Atchison, Topeka and Santa Fe Railway Company; The Chesapeake and Ohio Railway Company; Chicago, South Shore and South Bend Railroad; Detroit, Toledo and Ironton Railroad Company; Elgin, Joliet and Eastern Railway Company; Grand Trunk Western Railroad Company; New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Wabash Railroad Company.

JURISDICTION.

The judgment of the Court of Appeals was entered March 2, 1965, and a timely petition for rehearing was denied April 16, 1965 (R. 41-42). The petition for a writ of certiorari was filed July 14, 1965, and was granted February 21, 1966 (R. 43, 383 U. S. 906).

STATUTES INVOLVED.

The pertinent provisions of the Interstate Commerce Act here involved are Sections 1, 8 and 16, 49 U. S. Code §§ 1, 8 and 16, and are reproduced in the Appendix to the brief for Canada Packers, Limited, Petitioner.

QUESTION PRESENTED.

The basic question presented is as follows:

Where the Interstate Commerce Commission found that charges assessed for railroad transportation of shipments from origins in the United States to destinations in Canada were in excess of maximum reasonableness, and where the Commission also had made findings of maximum reasonableness of rates on contemporaneous shipments of the same commodity from the same origins to the border crossings through which the international shipments passed en route to Canada, did the Commission exceed its territorial jurisdiction in failing to observe the maximum reasonable rates to the border crossings as a maximum guide in awarding damages with respect to charges assessed on the international shipments?

STATEMENT.

Canada Packers, the petitioner, is a Canadian corporation which manufactures fertilizer at various locations in the Provinces of New Brunswick, Ontario and Quebec, Canada (R. 25).

In 1950 Canada Packers filed an informal complaint with the Interstate Commerce Commission alleging that the joint through charges paid for railroad transportation of 131 carload shipments of potash from Carlsbad and Loving, New Mexico[2] to petitioner's plants at Toronto and Welland, Ontario; Montreal, Quebec; and St. John, New Brunswick, Canada during the period January 5, 1948 through May 5, 1948 were unjust and unreasonable, and reparation was sought. All of the shipments crossed the international border at Detroit or at Port Huron, Michigan (R. 26-27).

Action on the informal complaint was deferred, awaiting decisions in related cases pending before the Commission, including its Docket 30578, *Consolidated Rendering Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 287 I. C. C. 673, 300 I. C. C. 87 (R. 27-28). On March 18, 1957, the Commission handed down its decision in *Consolidated Rendering, supra,* holding, among other things, that rates on potash that were in effect between January 5, 1948 and May 5, 1948 from Carlsbad and Loving to Detroit and Port Huron were unreasonably high and prescribing, retroactively, maximum reasonable rates on a lower level (R. 29). The Commission there found that the maximum reasonable rate which the carriers could charge during that period of time for a movement of potash from Carlsbad or Loving to Detroit or Port Huron was $12.70 per ton, and the Commission awarded reparation in the amount of 62¢ per ton, since the carriers had assessed a rate of $13.32 per ton (R. 29-30).

Canada Packers thereupon filed a formal complaint repeating the allegations of its informal complaint (R. 5-9, 30). The rates Canada Packers paid and the rates Canada

2. Shipments from Trona, California were also involved in the complaint before the Commission, but such shipments are not at issue here.

Packers contended were maximum reasonable rates are shown in the following comparisons on a rates-per-ton basis (R. 12, 15, 29-30):

Canadian Destination	Rate Charged	Rate Sought	Difference
Toronto, Ont.	$14.64[3]	$13.80	84¢[3]
Welland, Ont.	14.64[3]	13.80	84¢[3]
Montreal, Que.	17.28[3]	16.00	128¢[3]
St. John, N. B.	20.40	18.60	180¢[4]

The Commission, in its report in *Canada Packers, Ltd.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 313 I. C. C. 759 (1961), held that the rates assessed were unreasonable as alleged in the complaint and prescribed maximum reasonable rates, on the basis sought, retroactively for the period in which the shipments had moved (R. 17, 30-31). The Commission, in measuring the shipper's damages, rejected the contention of the railroads that it lacked jurisdiction to make an award exceeding the reparation award made in the *Consolidated Rendering* case to the border points, Detroit and Port Huron, at which these shipments crossed into Canada (R. 16-17).

Following an examination by the carrier of paid freight bills submitted by the shipper, the respondents made certification of the accuracy of the shipper's compilation of

3. The opinion of the court below shows the rates to Toronto and Welland as $14.60, and the difference from the rate sought as 80¢, while the rate to Montreal is shown as $17.20, and the difference from the rate sought as $1.20 (R. 37); the court apparently relied upon a portion of the stipulation of facts showing such rates (R. 30). The evidence before the Commission was conflicting as to the measure of the rates charged to these destinations, and conflicting sets of rates were inadvertently included in the stipulation of facts (R. 12, 15, 29-30). Respondents are satisfied that the figures shown in the foregoing table are correct; they are also consistent with those contained in petitioner's brief (p. 7). These discrepancies do not in any way affect the issues involved.

4. Based upon correction by the Court of Appeals of an obvious arithmetical error in the stipulation of facts (R. 37).

total transportation charges paid on these shipments. Thereafter, the Interstate Commerce Commission issued its order of August 28, 1962 (R. 19-21), specifying that Canada Packers was entitled to reparation from the carriers which transported the shipments "insofar as the transportation took place over their lines in the United States" and specified particular amounts of damages in dollars and cents, subject to the qualification "insofar as the transportation took place in the United States."

The respondents made payment of reparation to Canada Packers in a sum less than the total of the amounts pertaining to the involved shipments, as listed in the reparation order. The total of those amounts, excluding interest, is $6,694.56.[5] Payment was made in the sum of $5,304.01, plus interest, leaving a difference, excluding interest, of $1,390.55. The sum, excluding interest, that was paid by the carriers, was measured by the difference between the total of the amounts pertaining to these shipments as listed in the reparation order and a portion thereof representing the share retained by the Canadian railroads for that part of the transportation that took place beyond the international boundary. Stated otherwise, respondents declined to make payment of reparation on that portion of the freight charges that was paid for transportation within Canada (R. 32).

Canada Packers filed suit against the railroads[6] for the balance, $1,390.55 (R. 1-5). The District Court entered judgment for Canada Packers, stating that the failure of the United States railroads to establish lawful rates applicable to the transportation performed by them in the

5. Excluding shipments from Trona, California; see footnote 2, *supra*.

6. Only the United States railroads participating in the joint through rates were named in the complaint, although the Canadian carriers had been named as defendants, along with the United States carriers, in the Commission proceedings (R. 6, 31).

United States had compelled Canada Packers to pay the joint through international rates, and that, in consequence, the Commission was justified in awarding Canada Packers the full amount by which those rates exceeded the maximum reasonable rates as determined by the Commission (R. 33-34).

The railroads appealed, and the Court of Appeals for the Seventh Circuit reversed (342 F. (2d) 563) (R. 36-41).

Two issues were before the Court of Appeals. The first issue was whether or not respondents had complied with the Commission's order directing payment of reparation. That order, as noted, was qualified by the phrases "insofar as the transportation took place over their lines in the United States" and "insofar as the transportation took place in the United States" (R. 19-21). Respondents, by refusing to pay reparation in the total sums listed and instead paying to Canada Packers an amount computed by deducting the portion attributable to transportation performed in Canada, contended that they had in fact complied with the terms of the order in the light of its specific territorial limitations. This issue was discussed, but not resolved, by the Court of Appeals (R. 37-39).

The second issue, which was in fact resolved by the Court of Appeals, was whether, even if the respondents' interpretation of the language of the reparation order is not correct, the order is beyond the territorial jurisdiction of the Commission. In reversing the judgment of the District Court, the Court of Appeals held that since the respondents had demonstrated what the Commission itself had found, in the *Consolidated Rendering* case, to be contemporaneous maximum reasonable rates from the origins in New Mexico to the border points through which the Canada Packers international shipments moved, those prescribed rates must be considered as a maximum guide in awarding damages to

Canada Packers (R. 38, 40). A contrary conclusion, the Court held, would require respondents to pay reparation on account of freight charges paid for transportation performed within Canada by Canadian railroads, a result prohibited by the territorial limitations of Section 1 of the Interstate Commerce Act (49 U. S. C. §1) (R. 40). Therefore, judgment and order of the District Court were reversed (R. 40).

SUMMARY OF ARGUMENT.

The Interstate Commerce Act, which applies to common carriers engaged in the transportation of property by rail, and to such transportation, from any place in the United States to or from a foreign country "but only in so far as such transportation takes place within the United States," requires that charges for the transportation of property shall be just and reasonable, and prohibits every unjust and unreasonable charge (49 U. S. C. Sec. 1(1)(2)(5)).

The Interstate Commerce Commission made a finding that the freight rates charged for transportation of petitioner's shipments of potash from New Mexico to Canadian destinations were unjust and unreasonable, and awarded damages to the extent to which it considered such charges to be in excess of maximum reasonableness. The Commission based its decision upon a finding in another case that rates charged on contemporaneous shipments of potash from New Mexico to Detroit and Port Huron were unreasonable. Although the petitioner's shipments were from the same origins and crossed the border at Detroit and Port Huron en route to their destinations in Canada, the Commission refused to limit its reparation award to the measure of unreasonableness found to exist contemporaneously to the border crossings. Instead, the Commission in each case made a finding that the shipper was damaged to the extent to which an interim rate increase of 20% exceeded a sub-

sequent permanent maximum rate increase of $1.60 per ton fixed by the Commission, and was entitled to reparation in that measure. As a result of applying the same formula for computing damages on both the domestic and the international shipments, reparation on shipments terminating at Detroit was ordered in the amount of 62¢ per ton, but on petitioner's shipments which passed through Detroit to Toronto, reparation was awarded in the amount of 84¢ per ton, and on shipments going beyond Toronto to Montreal, reparation was awarded in the amount of $1.28 per ton.

Respondents contended that the reparation award was beyond the scope of the Commission's territorial jurisdiction by the extent to which it exceeded what the Commission had determined to be a maximum reasonable rate for that part of the transportation performed within the United States, that is, from the New Mexico origins to the border crossings at Detroit and Port Huron. The position of the respondents was upheld by the court below.

Petitioner relies principally upon the decisions in *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179 (1927), and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654 (1931), both of which recognized jurisdiction of the Commission to award damages for unreasonableness in a joint international rate without deduction of a share of the charges attributable to transportation within a foreign country. The instant case is distinguishable because it involves the unusual circumstance of the Commission itself having made a determination of a maximum reasonable rate between the New Mexico origins and the border points through which the Canada Packers shipments passed en route to the destinations in Canada.

Awarding a greater measure of damages in connection with the Canada Packers shipments than in connection with the Detroit shipments, where the former differed only in

that additional transportation was performed beyond the international boundary, identifies the award as an attempt by the Commission to regulate rail transportation within Canada. The award cannot be deemed to relate only to transportation within the United States, for the Commission expressly found that the measure of unreasonableness in the charges from New Mexico to Detroit was 62¢ per ton, and the Commission cannot hold contemporaneously that the charges from New Mexico to Detroit were unreasonable by 62¢, 84¢, and $1.28. The difference between the 62¢ award and the 84¢ and $1.28 awards can be explained only as a measure of the unreasonableness the Commission found to exist for transportation beyond Detroit, which was transportation within Canada.

The decision of the Court of Appeals thus properly restricts the Commission's award within the jurisdictional confines of Section 1 of the Interstate Commerce Act (49 U. S. C. § 1). Its judgment should be affirmed.

ARGUMENT.

I.

The Interstate Commerce Commission, in Awarding Damages on Account of Unreasonable Freight Charges for Railroad Transportation of Potash From New Mexico, Cannot Penalize Carriers to a Greater Extent on International Shipments Moving Into Canada Than on Contemporaneous Shipments Traversing Only the United States Portion of Such Routes Where a Maximum Reasonable Rate Had Been Prescribed for That Portion.

Canada Packers (Br. 11-15) asserts that the issue presented is not novel and was resolved by the Court in *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179 (1927), and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654 (1931). Respondents submit, however, that the question presented has not been considered heretofore in the courts, even though the determinative territorial limitation provisions of Section 1(1) and (2) of the Interstate Commerce Act (49 U. S. C. § 1(1)(2)) have been in effect since 1920.[7]

Section 1(1) and (2) of the Interstate Commerce Act (49 U. S. C. § 1(1)(2)) provides that the provisions of Part I of the Act shall apply to transportation of property "only in so far as such transportation takes place within the United States . . ." Section 1(5) (49 U. S. C. § 1(5)) requires that charges for the transportation of property "shall be just and reasonable" and prohibits every "unjust and unreasonable" charge.

7. See *United States* v. *Pennsylvania Railroad Co.*, 323 U. S. 612, 620-621 (1945).

In both of the cases relied upon by petitioner, it was held that a shipper was entitled to reparation on account of unreasonableness of a joint international rate. However, in neither of these cases did the record disclose the existence of a maximum reasonable rate for that part of the transportation that was performed in the United States. Hence there was no basis, in fixing damages, for making a deduction on account of transportation performed beyond the international border.

Thus, in *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179, 187 (1927), involving a joint international rate from a point in Canada to a point in the United States, the Court pointed out:

> "The failure to establish rates covering the transportation from the international boundary contravened the provisions of the Act and compelled plaintiff in error to pay the through charges complained of."

Similarly, in *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 660, 661-662 (1931), in discussing a joint international rate from a point in Mexico to a point in the United States, the Court declared:

> "The Act does not empower the Commission to prescribe or regulate such rates. It applies to international commerce only in so far as the transportation takes place within the United States. The Act applied to the transportation of the cow peas from the boundary to destination and required defendant to establish just and reasonable rates for that service. And defendant was liable to shippers for damages resulting from its failure so to do. §§ 1(1)(c), (2) and (5), 6(1), (7) and 8.
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> "While the Act does not govern the joint through international rate, the demand for reparation is grounded upon the claim that the maintenance of that rate participated in by the American carrier and its violation of the Act, in failing to maintain a just and rea-

sonable rate for the transportation from the boundary to destination, operated to compel payment of the charges based on the excessive joint rate."

In the instant case, however, as the Court of Appeals pointed out (R. 38), the Interstate Commerce Commission itself, in *Consolidated Rendering Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 300 I. C. C. 87 (1957), had made a finding as to maximum reasonable rates on potash from the origins in New Mexico to the border crossings at Detroit and Port Huron retroactively to the very period of time within which petitioner's shipments moved. This case, therefore, unlike either *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179 (1927), or *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654 (1931), involves the unusual circumstance of the Commission having made a determination of a just and reasonable rate between the New Mexico origins and the border points through which the Canada Packers shipments passed en route to their destinations in Canada. Awarding a greater quantum of damages in connection with the Canada Packers shipments, where those shipments differed only because additional transportation was performed beyond the Canadian border, clearly identifies the award as an attempt by the Commission to regulate rail transportation within Canada, in violation of Section 1 of the Interstate Commerce Act (49 U. S. C. § 1). That section explicitly confines the Commission's jurisdiction "only in so far as such transportation takes place within the United States."

Petitioner's brief (p. 15) quotes from the decision below the comment that (R. 39): "In the case at bar, rates from New Mexico to the border points were in effect and hence this case is not governed by *News Syndicate.*" Respondents submit that this quotation must be viewed in its context, since the court below was careful to identify such rates to the border points as rates that had been pre-

scribed by the Commission as maximum reasonable rates (R. 38). A reading of the entire opinion demonstrates that the Court of Appeals distinguished the factual situation from the *News Syndicate* case because here it was shown that the Commission itself had prescribed maximum reasonable rates for the part of the transportation that was performed within the United States.

Petitioner has emphasized (Br. 14-19) that in the *Lewis* case the Court pointed out that the existence of a rate (not shown to be just and reasonable) covering transportation between the international boundary and the destination in the United States was insufficient to excuse the carrier involved from an award of reparation covering the through international transportation. Here, however, the situation is markedly different, for the Court of Appeals has required the Commission, in computing damages in connection with charges assessed against an international shipment, to observe the same standard which the Commission itself had established as proper for computing damages in connection with charges assessed against contemporaneous shipments traversing only the United States portion of such routes. Neither respondents nor the court below have contended that the maximum reasonable rates prescribed by the Commission from Carlsbad and Loving to Detroit and Port Huron are applicable *per se* to the Canada Packers shipments, and, it is submitted, petitioner's argument (pp. 17-19, 21-22) regarding applicability of rates is not pertinent to the issue here. The real issue is whether, in computing damages in the light of the unusual factual context presented, the Commission observed a standard consistent with its limited territorial jurisdiction.

Petitioner has argued that respondents "are liable for the full amount of damages regardless of the proportion of the excess charges which may be attributable to any single railroad or group of railroads" (Br. 20), citing *Louisville*

& Nashville Railroad Co. v. *Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217 (1925). That decision constitutes a recognition of the fact that liability to pay reparation in connection with a domestic joint through rate is joint and several, and is not pertinent to the issue of how reparation should be computed where a joint international rate is involved.

Petitioner has pointed out, referring to *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179 (1927), and *International Nickel Co.* v. *Director General*, 66 I. C. C. 627 (1922), instances in which reparation has been awarded in connection with unreasonable joint international rates without regard to the portion of the through charge that is attributable to transportation performed within the United States. Nevertheless, in all such cases other than the instant case, there was no evidence of a maximum reasonable standard covering the domestic leg of the through transportation, and in the absence of such standards the Commission itself has called attention to the practical difficulty of finding only a portion of a joint international rate unreasonable. See *Black Horse Tobacco Co.* v. *Illinois Central Railroad Co.*, 17 I. C. C. 588, 590 (1910); *Citizens Gas & Coke Utility* v. *Canadian National Railways*, 325 I. C. C. 527, 530, 531 (1965). No such practical problem exists, of course, where the Commission has fixed a contemporaneous standard of reasonableness for the domestic leg.

II.

The Commission, in Awarding Damages on Account of Unreasonable Freight Charges, Cannot Award Different Measures of Damages Where the Only Difference Between Shipments Is the Amount of Transportation Performed Within a Foreign Country.

Canada Packers has interpreted the decision of the Court of Appeals as establishing that "the domestic rates would serve as the maximum measure of the injury to a shipper who was compelled to pay unreasonably high joint through rates" (Br. 22). Petitioner's statement is correct, assuming, of course, that the domestic rates referred to as a standard consist of rates prescribed by the Commission as contemporaneous maximum reasonable rates. Petitioner, however, is not satisfied with such a standard, contending that (Br. 22) "the shipper has been injured, but under the Court of Appeals' decision it would be an injury for which the law provides no remedy."

Canada Packers apparently wants the Commission to be able to continue, as attempted here, to award damages on account of allegedly unreasonable freight charges even where such charges clearly are identifiable as pertaining to transportation performed within a foreign country and the shipper also has been awarded damages for the domestic portion of such transportation according to the same standard fixed as appropriate for domestic shipments.

The far-reaching nature of petitioner's demands can be emphasized by discussing specific examples. As pointed out previously, the Commission found, in *Consolidated Rendering Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 300 I. C. C. 87 (1957), that at the time petitioner's shipments moved the maximum reasonable rate which the carriers could charge on potash from Carlsbad to Detroit was $12.70

per ton, and the Commission awarded reparation in the amount of 62¢ per ton since the carriers had assessed a rate of $13.32 per ton (R. 30, 38). The damages were computed on the extent to which an interim rate increase of 20%, authorized by the Commission to be effective during the period January 5 through May 5, 1948, exceeded a maximum rate increase of $1.60 per ton fixed by the Commission as effective May 6, 1948 (R. 11-12). In its consideration of the charges assessed against the Canada Packers shipments, the Commission, citing its *Consolidated Rendering* decision as authority and applying the same reparation formula (the extent to which the 20% interim increase exceeded a final maximum increase of $1.60 per ton), held that the rate of $14.64 which the carriers assessed on the shipments that moved from Carlsbad to Toronto and Welland, Ontario via Detroit[8] was in excess of a maximum reasonable rate of $13.80, and awarded reparation for the difference, 84¢ per ton (R. 14-15, 29-30, 37-38). Obviously, by awarding reparation in the amount of 62¢ per ton on shipments that terminated at Detroit and in the amount of 84¢ per ton on shipments that crossed the international boundary at Detroit and terminated at Toronto, the Commission was awarding 22¢ per ton damages attributable solely to transportation performed in Canada by Canadian railroads.

Furthermore, the Commission attempted to escalate the damages in direct proportion to the amount of additional transportation performed within Canada. For example, in those instances in which petitioner's shipments crossed the border at Detroit and went beyond Toronto to Montreal, the Commission awarded damages not merely to the extent

8. All of the Canada Packers shipments crossed the border at either Detroit or Port Huron. Since rates from both Carlsbad and Loving are identical to both points, for reasons of convenience only Carlsbad and Detroit are referred to in the examples discussed (R. 27, 30).

of 62¢ per ton (as at Detroit), or even 84¢ per ton (as at Toronto), but in the much greater sum of $1.28 per ton (R. 29-30, 37).[9] Yet, manifestly, the only difference between the shipments terminating at Toronto and those terminating at Montreal consists of the additional transportation service *within Canada* received by the latter. Clearly such an award is outside the scope of the Commission's territorial jurisdiction as prescribed in Section 1 of the Interstate Commerce Act (49 U. S. C. §1).

Petitioner has argued that the Canadian railroads were not indispensable parties to this action (Br. 22-23). Respondents do not believe such an issue is before the Court. Nevertheless, as the Court of Appeals pointed out, the incongruous effect of the Commission's award, if enforced in the manner sought by Canada Packers, would require United States railroads "to pay reparation to a Canadian consignee on account of freight charges received for transportation performed within Canada by Canadian railroads" (R. 40).

III.

The Decision of the Court of Appeals Protects Carriers From Arbitrary Changes in the Commission's Standards of Reasonableness for the Same Measure of Transportation.

Petitioner's concluding argument (Br. 23-24) is to the effect that respondents should be required to pay the full amount of reparation fixed by the Commission because of their failure to establish just and reasonable rates appli-

9. On shipments to St. John, New Brunswick, which also crossed the border at Detroit, damages awarded were nearly treble those on the Detroit shipments, 180¢ per ton versus 62¢ per ton (R. 30, 37). The St. John shipments re-entered the United States at Megantic, Quebec and recrossed the border at Vanceboro, Maine (R. 27).

cable on international commerce in so far as the transportation takes place within the United States. Respondents submit that under the circumstances of this case respondents were excused from any such responsibility by the Commission's own action in establishing a maximum reasonable standard for transportation between the United States origins and the border crossings.

In effect, what the Commission has done is to reject its own standard of reasonableness. The Court, in *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 U. S. 370, 390 (1932), held that the Commission cannot, in awarding reparation in connection with a domestic rate, ignore its prescribed maximum reasonable standard between the points involved. Here the Commission would disregard such a standard merely because the shipments involved traversed additional distances in a foreign nation.

The reparation award cannot be construed to relate only to transportation within the United States, for the Commission expressly found that the measure of unreasonableness in the charges from Carlsbad to the border, Detroit, was 62¢ per ton. It would be contrary both to logic and to law to assert that the Commission can hold contemporaneously that the charges from Carlsbad to Detroit were unreasonable by 62¢, 84¢, and $1.28. The only way to explain the difference between the 62¢ award and the 84¢ and $1.28 awards is that the latter two are a measure of the unreasonableness which the Commission found to exist for the hauls beyond Detroit. The decision of the Court of Appeals thus has the effect of restricting the Commission's award of damages within the confines of Section 1(1) and (2) of the Interstate Commerce Act (49 U. S. C. § 1 (1) (2)) as construed in *United States* v. *Pennsylvania Railroad Co.*, 323 U. S. 612, 621 (1945), in which the Court stated:

"These decisions simply meant that whatever power

Congress might have to regulate the conduct of its domestic companies doing business abroad, it had, by the limiting provisions of the 1920 Act, expressed its purpose not to empower the Commission with general authority to regulate rail transportation within foreign countries."

IV.

The Commission's Arguments Are Not Germane to the Issue of the Jurisdiction of the Commission to Require Reparation Based Upon an Entire International Joint Rate Where the Commission Also Had Made a Finding of Maximum Reasonableness Between the United States Points Involved.

The Interstate Commerce Commission has submitted a brief as *amicus curiae* pursuant to Rule 42 of the Rules of this Court.

The Commission has described the decision of the Court of Appeals as holding that "since the domestic railroads had on file rates from the involved origins to points on the international boundary, a just and reasonable level of such domestic rates affords the maximum guide in awarding damages to the shipper" (Br. 2-3, 19). Respondents submit that there is no issue of rates from the involved origins to the border being "on file," but rather that the decision of the Court of Appeals rested on the fact that the Commission had prescribed what it considered to be maximum reasonable rates from the involved origins to the border points through which petitioner's shipments passed (see pp. 12-13, *supra*).

The Commission has placed considerable stress (Br. 11-14) on what is described as a consistent line of Court and Commission decisions recognizing the jurisdiction of the Commission to require reparation based upon an entire joint rate between the United States and Canada. Such

a line of decisions is not relevant here since in none of the cases discussed was an issue presented in which, as here, the Commission had made a contemporaneous finding of a maximum reasonable rate between the United States points involved. Furthermore, *H. K. Porter Co.* v. *Central Vermont Railway*, 366 U. S. 272, 274 (1961), one of the cases relied upon by the Commission (Br. 13), involved neither a finding of unreasonableness nor an award of damages.

It is asserted that the Commission has not "directly interfered with the jurisdiction of any foreign government" (Br. 13-14). Nevertheless, the Commission surely has attempted to regulate matters outside its own territorial jurisdiction by the technique exercised herein, *i.e.*, penalizing carriers to a greater extent on shipments moving into Canada than on contemporaneous shipments traversing only the United States portion of such routes, with the penalties made progressively more severe in relation to the quantity of transportation that took place within Canada (see pp. 15-17, *supra*).

Much of the Commission's brief consists of criticism of the position advanced by the United States to the effect that the proper measure of damages to be awarded by the Commission is the amount by which the division of the joint rate actually received by the American carrier exceeds the maximum reasonable rate for the American leg of the trip, as determined by the Commission (Br. 4, 16-18). The Commission's criticism of this position rests upon a belief that such a method of computing damages is "improper and unworkable" (Br. 4) and that divisions may be useful, but "are not conclusive" evidence of reasonableness of the rates charged (Br. 17). Respondents submit that the technique proposed by the United States might not be as burdensome and unworkable as suggested, for the Commission upon occasion has considered separate divisions received by either Canadian carriers or

American carriers in resolving questions of reasonableness involving international joint rates; see *International Paper Co.* v. *Delaware & Hudson Co.*, 33 I. C. C. 270, 274 (1915); *Carlowitz* v. *Canadian Pacific Railway Co.*, 46 I. C. C. 290, 292 (1917); *Sulphur, Canadian Origins to East St. Louis, Ill.*, 326 I. C. C. 288, 293, 317 (1966).

The Commission has suggested, alternatively, that "if the railroads have evidence that conditions in Canada require relatively higher rates, they should present such evidence to the Commission for its consideration" (Br. 17). Such an approach, of course, disregards questions of the Commission's jurisdiction to award reparation respecting charges for transportation performed within Canada and, in addition, improperly would put the burden of proof upon defending railroads to show that rates were not unreasonable rather than upon complaining shippers to prove unreasonableness; see *Pittston Paper Corp.* v. *Canadian National Railway Co.*, 165 I. C. C. 141, 144 (1930); *Conrad Fafard, Inc.* v. *Canadian National Railways*, 302 I. C. C. 163, 166 (1957).

The Commission has emphasized an alleged acquiescence upon the part of American railroads in the Commission's practice of awarding reparation by reason of unreasonable joint international rates without regard to the extent of the transportation performed beyond the border (Br. 11, 18). Respondents do not know whether or not such an assumption is valid generally, but it seemingly is invalid as far as the instant factual situation is concerned. As far as can be determined no previous litigation has involved the validity of a reparation order which fails to take into account that portion of the charges paid for transportation beyond the border where the Commission itself has established a contemporaneous maximum reasonable standard on like traffic moving between the same United States origin and the border crossing. For the same reason, the Com-

mission need not be apprehensive that affirming the decision of the Court of Appeals would be tantamount to "reversal of the long-standing decisions of this Court governing international rates" (Br. 19). The decisions relied upon by the Commission are distinguishable from the present case, for only the latter involves a situation in which the Commission had undertaken to establish a maximum reasonable standard of rates on the same traffic traversing only the United States portion of the international routes.

V.

It Is Not Necessary for the Court to Reexamine Its Decisions in Order to Resolve the Issue Presented, but Even if the Court Should Reexamine and Modify Such Decisions, the Result Here Would Not Differ in Substance From the Decision Below.

A brief as *amicus curiae* also has been filed by the United States, acting independently of the Interstate Commerce Commission. The position of the United States is in substantial conflict with the positions of petitioner and of the Commission, and is somewhat closer to the position of the respondents. Thus the United States is in accord with the view of the Court of Appeals and respondents that the Commission exceeded its territorial jurisdiction, but considers the decision below to rest "on questionable premises" (Br. 13).

The differences in the positions of the United States and the respondents are traceable primarily, it appears, to a somewhat different conception of the question presented herein. The United States describes the question presented in the following language (Br. 4):

> "Section 1(1) of the Interstate Commerce Act provides that the Interstate Commerce Commission has

> no power to regulate rail transportation outside of the United States. The basic question presented, in the view of the United States, is whether, when an American railroad establishes with either a Canadian or a Mexican railroad a joint through international rate, the Commission may find the rate to be unjustly and unreasonably high in its entirety, determine the maximum reasonable rate, and award a complaining shipper the difference as reparations. A subsidiary question is whether, and to what extent, the amount of reparations in such a case is limited by a prior Commission determination of the maximum reasonable rate that the American carrier may charge for a shipment to the place where shipments traveling under the joint through international rate cross the international border."

What the United States describes as "a subsidiary question" is, in the view of respondents, the basic question, so that it is not necessary for the Court to consider what the United States identifies as "the basic question presented." In other words, since the Commission had already made a determination of the contemporaneous maximum reasonable rate from Carlsbad and Loving, the origins, to Detroit and Port Huron, the border crossings, it appears unnecessary for the Court to determine whether the Commission would have had jurisdiction to award damages for the entire international charges from Carlsbad and Loving to the Canadian destinations if it had not made such determination of reasonableness for the rate to the border.

Insofar as the Canada Packers factual situation is concerned, it is the view of the United States that the Commission should have determined the maximum reasonable proportional rates for the American portions of these shipments and awarded Canada Packers the difference between a charge so computed and the divisions (if greater) received by the American railroads from the joint through

rates under which the shipments moved (Br. 33). It is respondents' position that this is compatible with the manner in which respondents observed the requirements of the reparation award (R. 32).

The United States, however, differs with the position of the respondents by contending that the rate prescribed as a maximum reasonable rate from Carlsbad to Detroit is not necessarily determinative of a maximum reasonable United States proportion of a rate from Carlsbad via Detroit to Toronto, for example, and urges that the matter be referred to the Commission for determination of this narrow question (Br. 34-35).

Respondents submit that it is unnecessary to refer such a question to the Commission for a redetermination. No better proof of the measure of unreasonableness of the American portion of the joint international rate could be found than a specific finding by the Interstate Commerce Commission of what a contemporaneous maximum reasonable charge should be for the American portion of the international shipments, and that determination was made by the Commission in *Consolidated Rendering Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 300 I. C. C. 87 (1957). In fact, not only did the *Consolidated Rendering* case contain findings as to maximum reasonable rates to the border crossings, but that decision was relied upon by the Commission here as its direct authority for a finding that the joint international rates were unjust and unreasonable to the extent that certain general rate increases temporarily authorized by the Commission were later found excessive (R. 9-18).

Furthermore, the Commission utilized a formula for computing reparation that was identical to the formula employed for computing reparation in the *Consolidated Rendering* case. Thus, in the *Consolidated Rendering* case

damages on charges for transportation from Carlsbad to Detroit were computed on the extent to which an interim rate increase of 20%, effective for the period January 5 through May 5, 1948 (during which period the Canada Packers shipments were transported) exceeded a maximum rate increase of $1.60 per ton, effective May 6, 1948 (R. 11-12). Then, in computing its reparation award to Canada Packers, the Commission, relying upon the authority of the *Consolidated Rendering* case, stated plainly that it was following the same formula, i.e., the extent to which the 20% interim increase exceeded the final maximum increase of $1.60 per ton on charges for transportation from Carlsbad via Detroit to Canadian destinations (R. 14-15).

Therefore, it is unnecessary to refer again to the Commission the question of determining a maximum reasonable charge for transporting potash from New Mexico to the international border for the period January 5 through May 5, 1948.

Respondents recognize the possibility that the Court will view the question presented in the broad terms described by the United States (Br. 4). In the event that the Court considers it necessary to resolve the basic question as thus presented, respondents agree with the view of the United States that the plain meaning of the territorial limitations of Section 1 of the Interstate Commerce Act (49 U. S. C. § 1) is that "the Commission has no power to determine what is a reasonable charge for a transportation service performed partly within a foreign country, and hence no power to determine, for reparation or other purposes, when a joint through international rate or a combination of proportional rates for an international rail shipment—in either case a charge involving foreign transportation—is unlawful" (Br. 11-12). See *United States* v. *Pennsylvania Railroad Co.*, 328 U. S. 612, 621 (1945).

The United States concedes that, for its position to be upheld, it will be necessary for the Court to reexamine, and modify substantially, its decisions in *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179 (1927); *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654 (1931); and *Great Northern Railway Co.* v. *Sullivan*, 294 U. S. 458 (1935) (Br. 21, 26, 35).[10] Respondents do not disagree with the convincing arguments advanced by the United States in support of its contention that the decisions referred to above should be modified substantially (Br. 14-26, 35-36).

The United States also has advanced the proposition that, assuming the Commission has no authority to determine maximum reasonable rates for an international through shipment, the proper measure of damages due by the domestic carrier on a joint through international shipment is the amount by which the division of the joint rate actually received by the American carrier exceeds the maximum reasonable rate for the American leg of the trip, as determined by the Commission (Br. 26-33). Respondents affirm that their method of compliance with the Canada Packers reparation order is in accord with the requirements of Section 1 of the Interstate Commerce Act (49 U. S. C. § 1) (R. 32). Nevertheless, assuming that the United States is correct in its contention that the Commission has no authority to determine maximum reasonable rates for an international through shipment, respondents do not quarrel with the proposal of the United States that, where the Commission prescribes a maximum reasonable rate for the American leg of an international shipment, the shipper is entitled to an award of damages only to the extent to which that maximum reasonable charge is exceeded by the division retained by the American carriers.

10. See also *United States* v. *Pennsylvania Railroad Co.*, 323 U. S. 612, 620 (1945) (footnote 9).

Such a procedure appears to be within the scope of the territorial limitations of Section 1 of the Interstate Commerce Act (49 U. S. C. § 1), and its practical results seemingly would not differ substantially from the results of the course of action followed here by the respondents.

CONCLUSION.

For the foregoing reasons, respondents submit that the petitioner is not entitled to additional damages clearly attributable, within the unique circumstances presented, to the allegedly unreasonable charges for transportation performed within Canada. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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October 1966.

PROOF OF SERVICE.

I, Harvey Huston, attorney for respondents and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of October, 1966, I served the foregoing brief as follows:

On petitioner by mailing a copy, properly addressed, with first-class postage prepaid, to Charles B. Myers, 611 Field Building, Chicago, Illinois, 60603;

On the United States by mailing copies, properly addressed, with air mail postage prepaid, to each of the following: Thurgood Marshall, Solicitor General, Donald F. Turner, Assistant Attorney General, Richard A. Posner, Assistant to the Solicitor General, Robert B. Hummel, Attorney, and John T. Marshall, Attorney, Department of Justice, Washington, D. C., 20530;

On the Interstate Commerce Commission by mailing copies, properly addressed with air mail postage prepaid, to Robert W. Ginnane, General Counsel, and Leonard S. Goodman, Assistant General Counsel, Interstate Commerce Commission, Washington, D. C., 20423.

HARVEY HUSTON.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CANADA PACKERS, LIMITED,

Petitioner,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY BRIEF

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INDEX

	PAGE
REPLY TO RESPONDENTS' BRIEF	2
News Syndicate and Lewis are not distinguishable	2
Detroit rates do not represent American portion of through transportation	7
Arizona Grocery principle not involved	10
Pennsylvania R. Co. does not support opinion below	11
Louisville & N. R. Co. case is appropriate	11
REPLY TO SOLICITOR GENERAL	12
Infirmities of government's position	12
No need for new damage rule	17
CONCLUSION	17

CITATIONS

Cases

Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co., 284 U.S. 370	10
Black Horse Tobacco Co. v. Illinois Central R. Co., 17 I.C.C. 588	15
Carstens Packing Co. v. Great Northern Ry. Co., 264 I.C.C. 164	4, 5, 10, 15
Consolidated Rendering Co. v. Atchison, T. & S.F. Ry. Co., 287 I.C.C. 673; 300 I.C.C. 87	3, 4, 8